No. 716

In The

Supreme Court of The United States

October Term, 1957

THE SUCHER PACKING CO.,

Petitioner,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM G. PICKREL
WILLIAM H. SHAW

PICKREL, SCHAEFFER & EBELING,
Third National Building,
Dayton, Ohio,
Attorneys for Respondent.

JEROME GOLDMAN,
911 First National Bank Bldg.,
Cincinnati 2, Ohio,
Attorney for Petitioner.

Of Counsel:
DOUGLAS G. COLE,
911 First National Bank Bldg.,
Cincinnati 2, Ohio.

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INTRODUCTION

It appears that petitioner contends that having allegedly made its position clear it was not necessary to thereafter object under rule 51, 28 USCA but an examination of the notes of decisions under rule 51, 28 USCA at page 524, note 1, and the Cumulative Annual Pocket Part 1957, page 377, notes 1 and 3, discloses that the decisions amply support the requirement that it is the duty of counsel under rule 51 to state distinctly the matter to which he objects and the grounds thereof under the facts in this case.

ARGUMENT

PETITIONERS POSITION

In the cases cited by petitioner in support of its claimed conflict under rules 46 and 51 of the Rules of Civil Pro-

cedure it is noted that counsels position in the cited cases remained firm and consistent at all times. In the instant case what was Petitioners position? Was it that taken by Petitioner when it modified its special charges to comply with the announced views of the trial court? Was it the one taken when Petitioner said to the Jury:

> (726) "and I may say to you also, in consideration of the case, at this point, sausage may be eliminated as the testimony of Harris, with respect to sausage is too indefinite. So, the case is now restricted and confined to fresh pork and smoked pork."

Was it the position taken when demand was made upon Petitioner under the Discovery Rules for the production of the employment records of William Harris and Petitioner produced what it represented to be such work record showing Harris' employment commenced July 26, 1950, six weeks before Harris was apprehented, and at the trial produced additional records purporting to show a prior employment date (31b, 32b).

Was it that taken when Petitioner conceded its inventory records were not essential when it said:

> "* * actually we would not need to show the computation of excess shrinkage in this case to present to the jury sufficient for them to consider to arrive at a verdict. They could take Harris' testimony and could compute and arrive at a figure of how much was taken and the value of it. * * *"

Was it that taken when Petitioner allegedly threw away its records during the pendency of this action?

Was it that taken in its attempt to have detective Merica testify that Jackson stated he had been stealing from petitioner for five years wholly disregarding Jackson's written confession taken by detective Merica that Petitioner had forwarded to Respondent which reads as follows:

"This statement taken by F. E. Merica of the Merica Detective Bureau this 11th day of September, 1950, at 2:20 P.M. from James Jackson. Statement taken by Louise Peters.

"Q. State your name, please.

"A. James Jackson.

"Q. Where do you live?

"A. 534 South Broadway.

"Q. How old are you?

"A. 34.

"Q. Are you married?

"A. Yes.

"Q. Do you have any children?

"A. Four.

"Q. Where do you work now?

"A. The Sucher Packing Company.

"Q. How long have you worked for Sucher's?

"A. About twelve years.

"Q. What are your duties at this time?

"A. Butcher.

"Q. James Jackson, I am about to take a statement from you regarding the theft of meats such as hams beef and bacon that was taken from The Sucher Packing Company over a period of time. Are you willing to give a true statement regarding your knowledge of thefts of this meat.

"A. That's right.

"Q. Do you realize that anything that you say could be used against you in any court of law having jurisdiction over this case?

"A. That's right.

"Q. Just state in your own words what you know about the theft of meats from Sucher Packing Company.

"A. Well, the only thing that I know about it William Harris asked me if I wanted to buy ham, and I told him 'No', that I didn't eat ham, and he asked me did I know of anybody that would want to buy any, and I told him 'No', but I would let him know and I told different ones about it.

"Q. Who did you tell about it?

"A. My brother, for instance.

"Q. What is his name?

"A. Arthur Jackson.

"Q. Where does he live?

"A. 70 Weller Street. He said 'Yes' he might have one, and I got the hams to take them to him.

"Q. Who else did you get orders from?

"A. There were just two people, my brother and Beulah.

"Q. Who is Beulah?

"A. The girl at the Classic Gardens.

Q. Did you talk to Gordon about hams?

A. Yes.

Q. Didn't Gordon order hams from you?

A. Yes, Gordon did.

Q. Didn't Bob Maiden talk to you about hams?

A. No, sir.

Q. Didn't Willie Early?

A. No, sir.

Q. What about Helen Hurt?

A. She definitely didn't talk to me about hams.

Q. But you did take orders and collect money from Beulah and Gordon and your brother?

A. That's right.

Q. How much money did you collect altogether?

A. Altogether about $25.00.

Q. How long have you been taking hams or having any knowledge of hams and other meats being taken from here?

A. About the last ten days.

Q. Wouldn't it be closer to say the last three weeks?

A. It would be too long.

Q. What about prior to the time of Harris?

A. I never carried out or sent anything out before that time.

Q. Did you take the order for six hams to be delivered to Gordon?

A. No, I didn't.

"Q. Did you take the order for the hams that were delivered to Beulah along with the pork loins?

"A. I know nothing of the pork or any beef.

"Q. What about some bacon?

"A. No bacon either.

"Q. But you did take orders for the hams from Gordon and from Beulah.

"A. That's right.

"Q. You put the hams in the barrel at different times so that William Harris could take these hams and put them in the trash truck?

"A. Me and Harris put them in the barrel together.

"Q. And this went on according to Harris's statement about almost every day?

"A. Definitely not.

"Q. About how often did you take it?

"A. I think it was twice last week.

"Q. You put some in the barrel Saturday?

"A. No, sir. I had to change clothes and get on the floor.

"Q. What about Friday?

"A. I think we did Friday.

"Q. How many did you put in the barrel on Friday?

"A. Three or four.

"Q. Is there any other information that you are withholding at this time that you want to clear up?

"A. No, sir, that's just about all.

"Q. You are willing to take a lie detector test to back up your statement. Is that true?

"A. That's right.

"Q. You have given me this statement of your own free will without being promised any immunity from prosecution or in any other manner given concessions?

"A. That's right.

"Q. Are you willing to sign this as a true statement?

"A. Yes. I'll sign it.

s/ James Jackson

"WITNESS

"F. E. Merica

"K. E. Smith"

Or was it that taken by Petitioner when on the morning of trial it withdrew all claims for loss of beef and veal notwithstanding its position that its exhibits which continued to include such loss should go to the Jury?

There is no case cited to this Honorable Court in which counsel has taken so many inconsistent positions and accordingly, the decision of affirmance by the Appellate Court is in every respect correct.

Even if Petitioner had been consistent in its position its inventory records would not be competent.

Evidence which shows that the "unexplained loss" may have been the result of various causes and only furnishes a choice among different possibilities is not competent. The jury is not permitted to guess and speculate on which cause or possibility is the basis for petitioner's "loss". *Ewing* v. *Goode* (6 Cir.) 78 Fed. 442, 444; *Grand Trunk R.R. Co.* v. *Holstein* (6 Cir.) 67 Fed. (2d) 780; *Cobb* v. *American Bonding Co.*, 118 Fed. (2d) 643; *New Amsterdam Cas. Co.* v. *W. D. Felder Co.*, 214 Fed. (2d) 825 Syl. 3; *Gedra* v. *Dallmer Co.*, 153 Ohio St., 258, 91 N.E. (2d) 256; *Kruper* v. *Procter & Gamble Co.*, 160 Ohio St. 489, 117 N.E. (2d) 7; *Gerick* v. *Republic Steel Co.*, 153 Ohio St., 463, 92 N.E. (2d) 393; *Stanley* v. *National Surety Co.*, 39 N.Y.S. (2d) 509.

CONCLUSION

Petitioner seeks to have this Honorable Court interpret various Rules of Civil Procedure which need no interpretation under the evidence in the instant case.

It was the constant change and modification of Petitioner's position in its attempt to recover $162,000.00 "unexplained loss" because of theft that exhaustive investiga-

tion disclosed caused a $291.00 loss that has caused all the confusion.

Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM G. PICKREL
WILLIAM H. SELVA

PICKREL, SCHAEFFER & EBELING
Third National Building
Dayton, Ohio
Attorneys for Respondent

Office - Supreme Court, U.S.
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Clerk

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Third National Building
Dayton, Ohio
Attorneys for Respondent

JEROME GOLDMAN
911 First National Bank Bldg.
Cincinnati 2, Ohio
Attorney for Petitioner

Of Counsel
DOUGLAS G. COLE
911 First National Bank Bldg.
Cincinnati 2, Ohio

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INTRODUCTION

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Respondent contends the Petition for a writ of Certiorari should be denied.

While Petitioner in this Court, as in the Appellate Court, propounds numerous questions, the real purpose for this Petition for Certiorari is to attempt to have this Honorable Court review the decision of the Appellate Court affirming the action of the Trial Court excluding Petitioner's records of inventory shortage from the con-

(* Figures in parenthesis refer to pages of the printed Record.)

sideration of the Jury and refusing to allow, over objection, a private detective employed by Petitioner who had taken a signed statement from James Jackson, to testify that James Jackson had orally stated that he had been stealing from Petitioner for five years where such witness called by Petitioner refused to testify.

QUESTIONS PRESENTED

1. Is the Trial Court correct in withdrawing from the consideration of the Jury Inventory Records based upon approximate figures which are uncertain and deficient and contain many errors?

2. Is the Trial Court correct in refusing to admit in evidence an oral statement of a witness made to a third party that the witness had been stealing from Petitioner for five years where the witness has given a signed confession to the third party which petitioner refused to produce and the oral statement does not relate to the theft of meat products, nor to the theft of the specific meat products in question, nor to the period for which plaintiff seeks to recover, and it is necessary to predicate an inference upon an inference

STATEMENT OF THE CASE

Petitioner has failed to serve Respondent with a copy of any portion of the record filed with the clerk of this Honorable Court.

Petitioner does not undertake to state the facts in clear and concise chronological order, but intermingles opinions, arguments, conclusions and statements, which are frequently unsupported on the pages cited by petitioner.

Petitioner's statement omits the following pertinent, essential facts.

(1) The alleged unexplained inventory loss was determined by adding the alleged gains and shrinks shown in each weekly inventory (7b, 8b) subtracting the gains from the shrinks and labeling the remainder "unexplained loss" (38b, 40b, 41b). No audit being attempted (15b, 41b).

(2) The alleged unexplained loss or shrink could come from errors in transfer, errors in taking the inventory, additional shrink due to spoilage, mistakes, improper shrinkage factors or theft (12b, 26b, 27b, 28b, 37b, 38b, 39b, 42b).

(3) The shortage complained of was based upon approximate inventories (7b, 8b, 19b).

(4) Petitioner's auditor would not certify to the accuracy of the figures contained in the weekly production analysis sheets from which the inventory loss was prepared (44b).

(5) Petitioner had no records to show its shrink experience (6b, 20b, 52b, 53b). Shrink experience was never determined from any audit (41b) and no shrink tests were made (47b, 48b).

(6) The only accurate inventory was that taken by petitioner's auditors at the fiscal close and this inventory was never given to the accountant who prepared the inventory shortage (7b, 24b, 25b, 26b). This inventory was frequently demanded but never produced during the trial.

(7) That there were substantial shrink shortages for the weeks immediately after Harris was apprehended on September 11, 1950, (23b) and petitioner's analysis sheets still provide for weekly shrinks and gains (30b, 43b).

(8) There were no records kept by petitioner of the meat employees were permitted to take for use in the cafeteria (26b, 48b, 49b).

(9) Petitioner is unable to say what amount of meat anyone was charged with stealing (33b, 34b).

(10) That "gambrels", from which the hog is hung, were weighed with the hog as the hog entered the cooler and removed when the hog entered the cutting room (21b, 22b,

23b. Deft's. Ex. G). No credit was ever allowed for the weight of the "gambrels".

(11) There were no reports of anyone wrongfully removing meat from petitioner's plant (30b. 46b. 47b).

(12) Air circulation, temperature, refrigeration, humidity, source and feeding of the hog all have a definite affect on shrinkage (53b. 54b. 55b. 56b). There were no records produced for the periods claimed, for any of these factors (53b).

(13) Petitioner's records show that William Harris was employed July 26. 1950 (19b. 20b. 32b).

(14) Petitioner refused to produce and offer the signed statement of James Jackson or any other employee even though defendant moved for such production (71b).

(15) Dressed whole hog sales were included in the inventory, but accruate records of such sales were not produced, although promised (22b) and the volume of bone removed in preparing pork hotel cuts was not known (49b).

(16) There was no allowance for meat spoilage during the three years for which claim was being presented.

(17) James Jackson never observed any unidentified employee take meat products from petitioners plant.

ARGUMENT

QUESTION 1

Petitioner in the Appellate Court candidly admitted that "the exclusion of appellants records was the most grievous error."

Because of petitioner's position the Appellate Court, after a careful analysis of the evidence, which petitioner now criticizes and contends was improper, said, in part:

> The complaint, filed by appellant, and the numerous amended complaints subsequently filed, embody

ing its changing contentions during the trial of the case, foreshadow the uncertainties of appellant's claims and proofs. On September 2, 1952, the complaint was filed; thereafter, an amended complaint, and a second amended complaint were filed. The second amended complaint was amended during the trial, and thereafter, again amended during the last day of the trial. The amended complaints withdrew claims of losses by theft of beef and veal from $9,620.91 to no loss whatever; of loss by theft of sausage from $12,546.74 to $10,392.74—and subsequently the claim for loss from sausage was entirely withdrawn; and, finally, complainant made an allowance for meat consumed by its employees in its cafeteria, which had previously been claimed as a loss by theft.

* * *

The foregoing, then, discloses that appellant first withdrew all claims for losses by theft of beef and veal, because it could not prove them. It then withdrew all claim for losses by theft of sausage, because it could not prove them. It then, in effect, withdrew all claims for losses by theft caused by unidentifiable employees as a class, because it could not prove them. It finally withdrew all claims for inventory shortage caused by dishonesty of employees because it could not prove them.

* * *

The records contained too many errors, uncertainties and approximations to enable a jury to draw any conclusion, except unwarranted speculation, from them, in arriving at an inventory shortage conclusively proving losses caused by the dishonesty of employees. The claimed inventory shortages would seem to be equally valueless to corroborate proof of theft by individual employees.

Even though it would appear that Petitioner's position had been made crystal clear when counsel said to the jury:

(Tr. 1153)

I submit to you, ladies and gentlemen, that in this case your problem has been much simplified by his Honor's ruling out all the figures which would have been a very difficult job. It involved a lot more work and even manpower in lugging the exhibits. You have a very simple fact to determine at this time."

It is obvious that the Appellate Court considered "the most grievous error" complained of by Petitioner as though Petitioner had fully and completely complied with Rule 51 of the Federal Rules of Civil Procedure and made its position clear to the Trial Court and noted its exceptions when the court said in its opinion:

> Even if appellant had requested the court to charge that its records showing inventory shortage could be considered by the jury as corroborating the direct evidence of appellant's loss by theft—and had duly excepted to the failure of the court so to instruct—it is doubtful that the court's refusal to give such requested instruction could be considered error under the circumstances of this case. Plaintiff's proofs of inventory shortage, and the records and computations made by them for the purpose of such proof, are uncertain and deficient."

As the Lower Court in its determination of this appeal assumed that Rule 51 had been fully complied with by Petitioner, the contention of Petitioner that this question was not saved for review is without foundation and contrary to the fact and there is no conflict.

QUESTION 2

Petitioner had refused to produce the written signed confession of James Jackson. The cases cited by Petitioner clearly disclosed that the statement admitted related to

the very issue involved. Petitioner said that if Merica had been allowed to testify he would say that Jackson said "he had been stealing from Sucher Packing Company for five years."

The period for which Petitioner sought to recover was two years. Petitioner sought to recover for loss of specific meat products. To be pertinent it would be necessary to predicate an inference upon an inference. The Trial Court correctly excluded the statement and no error occurred.

Evidence which requires superposing of inference does not constitute evidence. *Parker* v. *Gulf Refining Co.* (6 Cir.) 80 Fed. (2d) 795, Syl. 1; *O'Mara* v. *Pensy. R.R. Co.* (6 Cir.) 93 Fed. (2d) 762; *Commercial Standard Ins. Co.* v. *Gordons Transports Inc.* (6 Cir.) 154 Fed. (2d) 390, Syl. 6; *Westland Oil Co.* v. *Firestone Tire and Rubber Co.* (8 Cir.) 143 Fed. (2d) 326, Syl. 11; *Franklin* v. *Shelly Oil Co.* (10 Cir.) 141 Fed. (2d) 568, Syl. 7.

Petitioner's reference to harmless error and its application to the exclusion of Jackson's statement to Merica is based upon Petitioner's erroneous interpretation of the decision of the Appellate Court.

The Appellate Court held Jackson's statement inadmissible but went on to say that even if it be assumed that the Court erred, such error was not reversible in view of the evidence of the various instances where losses occurred, the deficiency in proof as to what and how much was stolen.

The alleged conflicts claimed by Petitioner do not exist as the Appellate Court considered all of the numerous questions presented by Petitioner as if Petitioner had taken every action required of him to reserve every question presented to the Appellate Court and determined that even then there was no merit to Petitioner's numerous